No. 00-1915

(2)

Supreme Court, U.S.
FILED
JUL 20 2001

In The
Supreme Court of the United States

ROLAND V. ASKINS, JR., INDIVIDUALLY AND AS TRUSTEE OF RVA TRUST,

Petitioner,

v.

COUNTY OF WILLIAMSBURG, SOUTH CAROLINA; J. WILLIAM HANNA; WILLIE L. FULMORE; MARGARET C. MCALISTER LYNCH; RICHARD F. BURCH; C. B. ASKINS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF SOUTH CAROLINA

RESPONDENTS' BRIEF IN OPPOSITION

E. Leroy Nettles, Sr.
Counsel of Record
NETTLES, TURBEVILLE & REDDECK
P.O. Box 699
Lake City, South Carolina 29560
(843) 493 2221

Counsel for Respondents

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

53 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

JURISDICTION 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

REASONS WHY THE WRIT SHOULD BE DENIED 3

I. PETITIONER FAILED TO PRESERVE THE FEDERAL ISSUES RAISED IN HIS WRIT WHEN HE FIRST APPEALED THE TRIAL COURT'S DECISION TO THE SOUTH CAROLINA COURT OF APPEALS 3

II. THIS CASE TURNS UPON THE APPLICATION OF EVIDENCE AND FACTS TO WELL SETTLED RULES OF STATE LAW 6

III. NO TAKING OF PRIVATE PROPERTY OCCURS WHEN THE EVIDENCE SHOWS VOLUNTARY AND INTENTIONAL DEDICATION TO PUBLIC USE 12

CONCLUSION 13

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Town of Hemingway,
237 S.E.2d 489, 269 S.C. 351 (1977).....7

Cardinale v. Louisiana,
394 U.S. 437 (1969)..... 1, 4, 13

Cleland v. Westvaco Corp.,
431 S.E.2d 264 (S.C. App. 1993).....10

County of Darlington v. Perkins,
269 S.C. 572, 239 S.E.2d 69 (1977) 7, 8, 9

Crowell v. Randell,
10 Pet. 368 (1836) 5

Dewey v. Des Moines,
173 U.S. 193 (1899) 5

Dolan v. City of Tigard,
512 U.S. 374 (1994)..... ... 12

Heckler v. Campbell,
461 U.S. 458 (1983).....4

Kentucky v. Stincer,
482 U.S. 482 U.S. 730 (1987) 4

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982).....4

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 4

Mack v. Edens,
320 S.C. 236,
464 S.E.2d 124 (S.C. App. 1995) 7, 9

McGoldrick v. Compagnie Generale Transatlantique,
309 U.S. 430 (1940) 4, 5

Miller v. Nicholls,
4 Wheat 311 (1819) 5

Murdock v. City of Memphis,
20 Wall. 590 (1875) 5

Owings v. Norwood's Lessee,
5 cranch 344 (1809) 5

Penn Central Transportation Co. v. New York City,
438 U.S. 104 (1978) 4

Safeway Stores, Inc. v.
Oklahoma Retail Grocers Assn., Inc.,
360 U.S. 344 (1959) 4

Shia v. Pendergrass,
222 S.C. 342,72 S.E.2d 699 (1952) 7, 10

State Farm Mutual Automobile Ins. Co. v. Duel,
324 U.S. 154 (1945) 5

Taylor v. Freeland,
503 U.S. 638 (1992) 4

Weems Steamboat Co. Of Baltimore City v. People's Steamboat Co.,
214 U.S. 345 (1909) 7, 12

Whitney v. California,
274 U.S. 357 (1927) 5

Youakin v. Miller,
425 U.S. 231 (1976).....4

Statutes

S.C. Code Ann. § 27-3-20 (1977).....10

Other Authorities

23 Am Jur.2d § 19 8

23 Am Jur. 2d § 28-29 8

25 Am. Jur. 2d, Dedication § 21 8

JURISDICTION

This Court's jurisdiction is in doubt because this is a state case where the only federal issue raised by petitioner was not raised when he appealed the trial court's ruling to the South Carolina Court of Appeals. *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969)

STATEMENT OF THE CASE

In July of 1996, petitioner erected dirt barriers across Fulmore Road in Williamson County, South Carolina where it crossed the eastern boundary of his property and at its junction with Beulah Road on his western boundary. Williamsburg County and a number of its citizens then sued petitioner seeking a declaration that Fulmore Road had been dedicated to public use and a permanent injunction preventing interference with the public's use of Fulmore Road. The trial court issued a *pendente lite* order on August 26, 1996, and a final order on April 30, 1999, declaring Fulmore Road to be a public road and permanently enjoining defendant from interfering with public use of the road. The court based its order on an evaluation of all the evidence, making a finding the road had been dedicated to public use. The trial court also found the county and its citizens had obtained an easement by prescription in the roadway. Petitioner then appealed to the Court of Appeals where he did not raise any federal issues or cite any federal constitutional provisions or federal cases. (See Res.App. A1-A6). The Court of Appeals upheld the trial court ruling finding it unnecessary to reach the prescriptive easement issue because the trial court properly found the road had been dedicated to public use. The Court of Appeals denied petitioner's petition for rehearing. The petitioner then petitioned the Supreme Court of South Carolina for a writ of certiorari which was denied. (Pet. App. A-1).

STATEMENT OF FACTS

Fulmore Road is a 1.6 mile improved dirt road connecting Jones Road and Beulah Road in Williamsburg County. Jones Road and Beulah Road are both public roads. There is a stop sign at the eastern end of Fulmore Road at the junction with Jones Road. Fulmore Road crosses two tracts of land known as the RVA Trust Property and the McAllister Estate. Fulmore Road is designated as CR 24-301 on state highway maps. It has been designated as a public county road on the general highway map of Williamsburg County published by the South Carolina Department of Transportation since at least 1968. Several local residents provided evidence that Fulmore Road has been maintained by the county for more than 60 years. (Res. App. B8-B9)

The road has been in existence and used by the general public for at least 100 years. The road has been regularly used by school buses, buggies and cars taking local children to school, and farmers traveling between their homes and their fields. It has long been regularly used by the general public as a means of traveling between Jones Road and Beulah Road. Fulmore Road is a necessary means of access for several local farmers to reach their farm lands. Over the years, it has also provided access to a cemetery and a number of residences located along the road. (Res. App. B8-B9)

Fifty three years ago, petitioner's father purchased the land known as the RVA Trust Property through which .7 (7/10) mile of Fulmore Road passes. For the next forty-nine years, neither petitioner's father nor petitioner did anything to interfere with the public's use of the road or to affirmatively put the county or the public on notice that they were merely allowing permissive use of a road they now claim to be private. They were silent when the road was added to state and county road maps approximately 35 to 40 years ago. They were silent when the road was named

"Fulmore Road" on maps approximately 15 years ago. They even remained silent when the road was designated as County Road 24-301 in 1992. (Res. App. B8-B9)

Until 1996, the only thing petitioner or his father ever did which might be considered inconsistent with the public nature of the roadway was to pay taxes on the entire RVA tract from which the land traversed by the road was not excluded on the tax rolls.

In July of 1996, petitioner erected dirt barriers in the road where it crossed his eastern boundary with the McAllister Estate and at the junction with Beulah Road on his western boundary. (Res. App. B8-B9)

In reaching its decision to uphold the trial court's ruling, the Court of Appeals found that the failure to exclude the area occupied by a road from the tax rolls and the consequent payment of taxes on the area was but one factor to be considered with all the other factors in determining whether a road had be dedicated to public use. The Court of Appeals found the other evidence in this case to outweigh that one factor, specifically noting that the evidence showed Fulmore Road had been publicly maintained as a public road for more than 60 years and that it had been used by all types of general public traffic since at least the late 1920's, approximately 20 years before petitioner's father acquired the land. (Pet. App. A-8 to A-9).

REASONS WHY THE WRIT SHOULD BE DENIED

I. PETITIONER FAILED TO PRESERVE THE FEDERAL ISSUES RAISED IN HIS WRIT WHEN HE FIRST APPEALED THE TRIAL COURT'S DECISION TO THE SOUTH CAROLINA COURT OF APPEALS.

When petitioner appealed to the Court of Appeals he did not raise any federal issues or cite any federal constitutional provisions or federal cases. (See Res.App. A1-A6). Petitioner first made his federal due process

arguments relying on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) in his Petition for Rehearing to the South Carolina Court of Appeals. (See Pet. App. A-51 to A-57).

When a party fails to raise an issue in the lower courts, that party waives his right to raise the issue in subsequent appeals. The Supreme Court has said "this Court does not decide questions not raised ... in the lower court[s]." *Taylor v. Freeland*, 503 U.S. 638, 645 (1992) citing *Youakin v. Miller*, 425 U.S. 231, 234 (1976). The Supreme Court considers questions raised by the petitioner in a petition for certiorari which were not preserved in the courts below only in exceptional cases and only when the cases come from the federal courts. As this Court pointed out in *Kentucky v. Stincer*, 482 U.S. 730, 747-748 fn 22 (1987), "it is 'the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed ... in the courts below.'" See also *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *Heckler v. Campbell*, 461 U.S. 458, 468-469 n.12 (1983).

This Court rigorously enforces its refusal to consider cases where the petitioner's federal issues were not preserved in the state courts below, declining to review such issues even where it might otherwise do so had the lower courts considering the case been federal courts. This principle is applicable even where the issue not preserved below is an issue of federal constitutional law. In *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969), in dismissing a writ improvidently granted because of lack of jurisdiction, this Court said:

Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, 25, 1 Stat. 85, vested this Court with no jurisdiction unless the federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller v. Nicholls*, 4 Wheat 311, 315 (1819) and since, e.g. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn.*, Inc.360 U.S. 344, 342, n.7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160-163 (1945); *McGoldrick v Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940); *Whitney v. California*, 274 U.S. 357, 362-363 (1927); *Dewey v. Des Moines*, 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis, 20 Wall. 590 (1875).*

Petitioner in this case did not raise federal constitutional due process issues in his initial appeal to the South Carolina Court of Appeals. Thus, he waived his right to raise these issues. His petition for rehearing and his petition for writ of certiorari to the South Carolina Supreme Court were denied. This Court should likewise deny his current petition because he did not preserve the issue below in the state courts of South Carolina.

II. THIS CASE TURNS UPON THE APPLICATION OF EVIDENCE AND FACTS TO WELL SETTLED RULES OF STATE LAW

The Petition should be denied because the judgment of the trial court in this case was driven by an evaluation of the evidence applied to well settled principles of state law. Contrary to petitioner's assertions, there has been no change in South Carolina law. This case does not depend upon a decision of law, much less a question of federal significance worthy of this Court's attention.

Petitioner admits that he and his family have permitted others to use Fulmore Road to travel between Beulah Road and Jones Road since his family acquired the surrounding track in 1947. He admits Fulmore Road has been shown as a county road on maps since 1966, that Fulmore Road was given a county road number designation in 1992, and that Fulmore Road has been maintained by the County since at least 1977. He also admits that the trial court had evidence from several local residents showing regular use by the public and school buses for more than 40 years. (Pet. pp. 6-8; Pet. App. at A-35) The evidence, however, shows extensive public use for an even longer period. It shows Fulmore Road has been in existence and regularly used by the public for over a century. The evidence also shows the road has been maintained by the

county for public use for more than 60 years, and that no prior objections to county maintenance or public use have been raised by petitioner's family or predecessors in title for more than half a century. The Court of Appeals specifically noted that the evidence showed Fulmore Road had been used by all types of general public traffic since at least the late 1920's, which is approximately 20 years before petitioner's father acquired the RVA tract. (Pet. App. A-8 to A-9).

Based on this evidence, both the Trial Court and the Court of Appeals made a specific factual finding that the evidence provided strict, cogent and convincing proof of a voluntary and intentional dedication of Fulmore Road to public use by petitioner's predecessors and petitioner.. (Pet. App. A-6 to A-9).

This Court has recognized that in appropriate circumstances, both the intent to dedicate and public acceptance of dedication can be implied. *Weems Steamboat Co. Of Baltimore City V. People's Steamboat Co.*, 214 U.S. 345, 357 (1909). It has been well settled under South Carolina law for many years that the intent to dedicate land to public use can be clearly and convincingly proved through proof of long term acquiescence to public use, especially where the road or area has been improved by public maintenance. *Anderson v. Town of Hemingway*, 237 S.E.2d 489, 269 S.C. 351 (1977) citing *Shia v. Pendergrass,* 222 S.C. 342 ,72 S.E.2d 699 (1952) ; *County of Darlington v. Perkins*, 269 S.C. 572, 239 S.E.2d 69 (1977); *Mack v. Edens*, 320 S.C. 236, 464 S.E.2d 124 (S.C. App. 1995). Over 20 years ago, in *County of Darlington v. Perkins*, the South Carolina Supreme Court said:

We are of the view, however, that the continuous and wide spread public usage of the road for at least fifty years, without charge or interference from previous owners and these landowners, clearly establishes the public character of the road. This conclusion is fortified by the extent and duration of the maintenance which the County has performed on the road. The testimony of the County Manager White reflects that the County installed a drainage system adjacent to the road, ditched the road on numerous occasions, cleaned the ditches and plowed the road from time to time, all at the request of various members of the public, and without any assistance from the landowners. The landowners have made no objection to the continued use of the road by the general public, or to the maintenance performed by the County on the road. We conclude that the evidence is sufficient to support a finding that the public has acquired an easement in the road by implied dedication. The intention to dedicate land to the public may be implied from circumstances or by acts or conduct of the owner from which a reasonable inference of an intention to dedicate may be drawn. 25 Am. Jur. 2d, Dedication § 21. Thus, "where acts of the owner justify the public authorities in believing the intention exists and they act on such belief, a dedication may be found to have occurred." 23 Am Jur.2d, supra, § 19. Such intention may be manifested by the owners acquiescence in continuous use of the land by the public under the claim of the general public right. 23 Am Jur. 2d, supra, § 28-29. 269 S.C. 572, 575-576.

As the trial court pointed out, the facts in this case are almost identical to the facts in *County of Darlington.* (Pet. App. pp. A-21 to A-22). Petitioner is incorrect in his statement that the Court of Appeals did not consider the maintenance of Fulmore Road in finding an intent to dedicate. In the portion of its opinion labeled "Discussion" where the court points out the evidence supporting the intent to dedicate, the Court specifically points out the evidence of a long period of continuous maintenance and emphasizes the continuing maintenance even after Williamsburg County ceased maintaining private roads. (Pet. App. at A-8 to A-9). Both the Trial Court and the Court of Appeals addressed petitioner's argument concerning the history of Williamsburg County road maintenance and rejected it, finding that the continuous use of the road by the public for more than 20 years and the order permitting continuation of maintenance after the County was ordered to discontinue maintaining private roads indicated the maintenance of Fulmore Road had always been maintenance as a public road at the request of the public. (Pet. App. at A-26 to A-27 and A-8 to A-9;) It should also be noted that while Williamsburg County had a history of maintaining private roads at the request of the landowner, petitioner adamantly asserts that the maintenance of the road traversing his land was not done at the request of the landowner. (Pet. p. 7) Thus this case is not distinguishable from *County of Darlington v. Perkins.*

Furthermore, the cases which petitioner relies upon for the proposition that permissive use is not sufficient use to prove intent to dedicate under South Carolina law are clearly distinguishable from the facts of the present case. As *Mack v. Edens*, 320 S.C. at 239, 464 S.E.2d at 126, points out, permissive use may not be sufficient evidence of intent to dedicate where the use is *sporadic and recreational.*

In *Shia*, one neighbor claimed that visitors to his house had been permitted to drive over another's neighbors alley to reach his back door. In *Cleland v. Westvaco Corp.*, 431 S.E.2d 264 (S.C. App. 1993), the sole purpose for public use traversing the defendant's land was to reach a landing on a river. The *Cleland* court described the public's use as "*recreational use* of the road to reach Mose Landing ... " 431 S.E.2d at 266

The evidence in this case, however, shows Fulmore Road is part of the normal flow of public traffic in the area. It is used daily by farmers and their employees going to and from their work in the fields and by public vehicles such as school buses. None of the use evidence in this case could be considered recreational use under S.C. Code Ann. § 27-3-20 (1977). Petitioner claims that the use is pleasure driving, but school buses transporting children to and from school and farmers and their employees traveling to and from their fields is not pleasure driving.

The trial court made a specific finding that the public use of Fulmore Road was neither sporadic nor recreational stating:

> This property has been listed on the state highway maps since 1968 and has continuously been used by the public for more than fifty years. Moreover, the County has maintained the road by putting in drainage pipes, repairing the road, cutting ditches all of which has been in the presence of the predecessors in title. The road *connects two undisputed public roads and has been used by the citizens of the county on a continuous daily basis for many years.* (Pet. App. A-26, emphasis added).

The Court of Appeals, which makes its own findings of facts in actions in equity such as public dedication actions, also specifically noted:

> Fulmore Road is a dirt road approximately 1.6 miles long, which connects two public roads. ... Willie Fulmore stated that all types of traffic, including school buses, have used Fulmore Road since the late 1920's. The other individual Respondents similarly stated the public had regularly used the road for as long as they had been familiar with it. They complained the Appellants' barricading of the road created problems for them and for all the residents of the area by interrupting the normal flow of traffic. (Pet. App. A-6 to A-8)

Furthermore, the portion of *Shia* which petitioner cites specifically states that payment of taxes is only weak evidence of the lack of intent to dedicate land to public use. (Pet. App. A-40). Payment of taxes is the only evidence in this case tending to indicate a lack of intent to dedicate, and both the South Carolina Court of Appeals and the Trial Court found that this weak inference against intent to dedicate was far outweighed by many other factors clearly and convincingly proving an intent to dedicate in this case.

While petitioner adamantly claims that he did not intend to dedicate Fulmore Road to the public, there is no claim anywhere in his arguments before the South Carolina Court of Appeals, the South Carolina Supreme Court or this Court that the land owners prior to his family's acquisition in 1947 lacked an intent to dedicate Fulmore Road to public use. However, both the Trial Court and the Court of Appeals noted regular public use going back to at least the late 1920's, approximately 20 years prior to acquisition of the land by petitioner's family. Both courts also pointed out evidence of public maintenance prior to acquisition of the

land by petitioner's family. And both courts specifically rest their findings of intent to dedicate on the intent of petitioner's predecessors as well as petitioner's family.

Two courts have now independently viewed the evidence in this case and made findings that the evidence clearly and convincingly proves the intent to dedicate Fulmore Road to public use by petitioner's predecessors in title and petitioner following clearly established principles of South Carolina law that have not changed for decades and which is consistent with the law of other states. There has been no change in South Carolina law and certainly no change worthy of expending this Court's precious time and resources.

III. NO TAKING OF PRIVATE PROPERTY OCCURS WHEN THE EVIDENCE SHOWS VOLUNTARY AND INTENTIONAL DEDICATION TO PUBLIC USE.

Petitioner relies on *Dolan v. City of Tigard*, 512 U.S. 374 (1994) in his due process arguments, claiming the Courts of South Carolina have "forced" a dedication of his land to public use. However, there is no forced dedication in this case. Two courts have independently examined the evidence and found clear and convincing proof that petitioner's predecessors and petitioner intentionally dedicated Fulmore Road to public use. Intent is a question of fact, not a question of law. Petitioner has had his day in court. Respondents have met their burden of proof. Fulmore Road was intentionally given to the public. It was not taken, with or without due process. The discussion of both the concept of public dedication and compensation for a public taking in this Court's decisions running from *Weems Steamboat Co. Of Baltimore City v. People's Steamboat Co.* to *Dolan* clearly indicate that where the evidence supports a finding of an intentional and voluntary public dedication, there is no taking. The non-existence of a taking is implicit in the finding of an intent to dedicate.

CONCLUSION

The Trial Court and the Court of Appeals, upon independent examination of the evidence in this case, both found that the evidence clearly and convincingly proved that petitioner's predecessors in title and petitioner's family intended to dedicate Fulmore Road to public use. That dedicated was accepted by over a century of regularly non recreational use by the public as part of the normal flow of traffic in the area. These factual findings are consistent with long standing South Carolina law, as well as a decision of the Court, that in appropriate circumstances both the intent to dedicate and the public acceptance of dedication can be implied from long term public use, especially when supported by other factors such as long term public maintenance of a road. This case presents a straight application of facts to well settled law. It presents no issues of law worthy of this Court's consideration. Furthermore, petitioner failed to preserve his federal constitutional arguments in the lower state courts, and therefore, under this Court's ruling in *Cardinale v. Louisiana*, it lacks jurisdiction. Accordingly, the Petition should be denied.

Respectfully Submitted,

E. Leroy Nettles, Sr.
Counsel of Record
Nettles, Turbeville & Reddeck
P.O. Box 699
Lake City, S.C. 29560
Ph (843) 493 2221

Counsel for Respondents

TABLE OF CONTENTS
Appendix to Brief in Opposition

Page

Excerpts of Brief of Appellant
Roland V. Askins, Jr. ..... Resp. App. A

Brief of Appellees
County of Williamsburg,
South Carolina, *et al.* ..... Resp. App. B

APPENDIX A

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM WILLIAMSBURG COUNTY
HONORABLE M. DUANE SHULER, JUDGE
NO. 96-CP-45-262

County of Williamsburg, and J. William Hanna, Willie L. Fulmore, Margaret C. McAlister Lynch, Richard F. Burch, and C.B. Askins, Respondents,	)
vs.	)
Roland V. Askins, Jr. Indivuidally and as Trustee of RVA Trust, and Buddy Platt, Defendants,	)
Of whom Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, is Appellant.	)

BRIEF OF APPELLANT

Stuart W. Snow
Dusenbury, Snow & McGee, P.A.
Post Office Box 555
Florence, S.C. 29503
843/669-6481
ATTORNEY FOR APPELLANT

OTHER COUNSEL OF RECORD:

William E. Jenkinson, III
Jennifer R. Kellahan
Jenkinson & Jenkinson, P.A.
P.O. Drawer 669
Kingstree, SC 29556
(843) 354-7417
ATTORNEY FOR RESPONDENT COUNTY

E. Leroy Nettles, Jr.
Nettles, Tubeville & Reddeck
P.O. Box 669
Lake City, SC 29560
(843) 493-2221
ATTORNEY FOR OTHER RESPONDENTS

TABLE OF CONTENTS

I. STATEMENT OF ISSUES ON APPEAL 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 4

A. The Trial Court Erred in Concluding that Plaintiffs have Established a Public Dedication of "Fulmore" Road, Because Plaintiffs Failed to Provide Cogent and Convincing Evidence of Public Dedication and Acceptance 4

1. No Easement - No Plat - No Dedication 6

2. Levy of Taxes Disproves Acceptance 7

3. Extensive Public Use Does Not Prove Dedication 7

4. Illegal Public Maintenance Does Not Demonstrate Public Dedication 10

B. The Trial Court Erred in Concluding that Plaintiffs have Established a Perspective Easement in "Fulmore" Road, Because the Evidence Establishes Permissive Public Use Upon Unimproved Land 15

C. The Trial Court Erred in Granting Plaintiffs an Injunction Prohibiting Defendant from Impeding the Public From Using the Portion of Fulmore Road Crossing Defendant's Property, Because it Deprives Defendant of Private Property without Just Compensation 18

IV. CONCLUSION 19

TABLE OF AUTHORITIES

Page

I. CASES:

Antonokas v. Anderson Chamber of Commerce,
130 S.C. 215, 126 S.E. (1924) 6

Babb v. Harrison,
220 S.C. 20, 66 S.E.2d 457 (1951) 17

Blanks v. Rawson,
296 S.C. 110, 370 S.E.2d 890 (App. 1988) 18

Boyd v. Hyatt,
294 S.C. 360, 364 S.E.2d 478 (App. 1988) 6

Cleland v. Westvaco Corp.,
314 S.C. 508, 431 S.E.2d 264 (App. 1993) 8

County of Darlington v. Perkins,
269 S.C. 572, 239 S.E.2d 69 (1977) 10, 11, 15

Helsel v. City of North Myrtle Beach,
307 S.C. 24, 413 S.E.2d 821 (1992) 4, 6, 7

Horry County, etc. v. Laychur,
315 S.C. 364, 434 S.E.2d 259 (S.C. 1993) 5, 7, 15, 16

Jowers v. Hornsby,
292 S.C. 549, 357 S.E.2d 710 (1987) 15

King v. Poston,
98-UP-435, S.C. App., October 19, 1998 ..... 11, 16

I. CASES(cont'd):

Mack v. Edens,
320 S.C. 236, 464 S.E.2d 124 (1995) 4, 5, 8, 9

Midland Guardian Co. v. Thacker,
280 S.E. 2d 26 (App. 1984) 15

Morrow v. Dyches,
328 S.C 522, 492 S.E.2d 420 (1997) 17

Revis v. Barrett,
321 S.C. 206, 467 S.E.2d 460 (S.C. App. 1996) 17

Riley v. Town of Greenwood,
51 S.E. 532 (S.C. 1905) 18

Safety Building & Loan v. Lyles,
128 S.E. 724 (S.C. 1925) 7

Sanitary & Aseptic Package Co. v. Shealy,
205 S.C. 198, 31 S.E.2d 253 (1953) 17

Snell v. Parlette,
273 S.C. 317, 256 S.E.2d 410 (1979) 15

Town of Estill v. Clarke,
179 S.C. 359, 184 S.E. 89 (1936) 5

Townes Assoc. Ltd. v. City of Greenville,
266 S.C. 81, 221 S.E.2d 773 (1976) 4, 15

Tyler v. Guerry,
251 S.C. 120, 160 S.E.2d 889 (1968) 4, 5, 11, 16

II. MISCELLANEOUS

Article 1, §13, of the S.C. Constitution 5

Rule 52(b), SCRCP 16

23 Am.Jur.2d, Dedication §79 7

39 Am.Jur.2d, Highways, Streets, and Bridges §26 18

I. STATEMENT OF ISSUES ON APPEAL

A. Did the Trial Court Err in Concluding that Plaintiffs have Established a Public Dedication of "Fulmore" Road, Because Plaintiffs Failed to Provide Cogent and Convincing Evidence of Public Dedication and Acceptance?

B. Did the Trial Court Err in Concluding that Plaintiffs have Established a Prescriptive Easement in "Fulmore" Road, Because the Evidence Establishes Permissive Public Use Upon Unimproved Land?

C. Did the Trial Court Err in Granting Plaintiffs an Injunction Prohibiting Defendant from Impeding the Public from Using the Portion of Fulmore Road Crossing Defendant's Property, Because it Deprives Defendant of Private Property Without Just Compensation?

II. STATEMENT OF THE CASE

In this action, the trial court declared that a portion of the property titled in the name of the RVA Trust had become public property by dedication to public use and public prescriptive easement, and granted a permanent injunction to prohibit Defendants from blocking public access thereto. The trial court rejected Defendant's request for a judgment declaring that the entire RVA Trust property is private, including the unpaved lane involved herein, which Plaintiffs refer to as "Fulmore" road. There is no dispute as to whether there is a lane traversing the RVA Trust property which has been traveled by the public; the only issue is whether the portion of the lane which lies upon the RVA Trust property is public or private.

"Fulmore" road is a dirt road of approximately 1.6 miles in length, which intersects with S.C. highway S-45-553 (Beulah road) on its western end, and Jones Road on its eastern end. Both Beulah road and Jones road are public roads (R. p. 15). "Fulmore" road traverses through two separate

* * *

APPENDIX B

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
HONORABLE M. DUANE SHULER, JUDGE

Case No.: 96-CP-45-262

County of Williamsburg, and J. William Hanna, Willie L. Fulmore, Margaret C. McAlister Lynch, Richard F. Burch and C. B. Askins
Respondents

v.

Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, and Buddy Platt
Defendants.

Of whom Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, is Appellant.

BRIEF OF RESPONDENT

W.E. Jenkinson, III
Jennifer R. Kellahan
JENKINSON & JENKINSON, P.A.
120 West Main Street
Post Office Drawer 669
Kingstree, South Carolina 29556
(843) 354-7417
Attorneys for County of Williamsburg

OTHER COUNSEL OF RECORD:

Stuart W. Snow
Dusenbury, Snow & McGee, P.A.
Post Office Box 555
Florence, South Carolina 29503
(843) 669-6481
Attorneys for Appellant

E. Leroy Nettles, Jr.
Nettles, Turbeville & Reddeck
Post Office Box 699
Lake City, South Carolina 29560
(843) 662-9008
Attorney for other Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF ISSUES ON APPEAL 4

STATEMENT OF THE CASE 4

FACTS 5

ARGUMENTS

I. **Standard of Review.** 7

II. **The Fulmore Road was Dedicated to Public Use** 8

A. The Owner expressed in a positive and unmistakable manner his intention to dedicate the property to public use. 8

1. Extensive long term public usage implies an unequivocal intent to dedicate. 9

2. The Owner acquiesced to extensive long term public maintenance from which intent to dedicate is implied. 13

B. The County accepted Fulmore Road as a public road. 16

C. Assessment of taxes on the Fulmore Road does not preclude dedication and acceptance. 18

III. The County Obtained a Prescriptive Easement for Fulmore Road. 20

A. The County's use was adverse and under claim of right. 20

B. The County's use had been continuous and uninterrupted for over twenty years and the identity of things enjoyed was proved. 23

IV. The Injunction prohibiting the Appellant from closing his road does not amount to a deprivation of private property without just compensation. 23

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Anderson v. Town of Hemingway,
269 S.C. 351, 237 S.E.2d 489 (1977). 18

Babb v. Harrison,
220 S.C. 20, 66 S.E.2d 547 (1951). 20

Boyd v. Hyatt,
294 S.C. 360, 364 S.E.2d 478
(Ct.App. 1988). 9,16

Cleland v. Westvaco Corporation,
314 S.C. 508, 431 S.E.2d 264
(Ct.App. 1993). 9

County of Darlington v. Perkins,
269 S.C. 572, 239 S.E.2d 69 (1977). 9,11,12,13

Delk v. Hill,
365 S.E.2d 218 (N.C.Ct.App. 1988). 21

Eldridge v. City of Greenwood,
331 S.C. 398,
503 S.E.2d 191 (Ct.App.1998) 7

Helsel v. City of North Myrtle Beach,
307 S.C. 24, 413 S.E.2d 821 (1992). 16,18

Hoogenboom v. City of Beaufort,
315 S.C. 306, 433 S.E.2d 875 (1992)
reh'g denied 317 S.C. 12,
451 S.E.2d 393 (1994). 9

8

Horry County v. Laychur,
315 S.C. 364, 434 S.E.2d 259 (1993). 14,17,20,2

King v. Poston, 1
98-UP-435 S.C. Ct.App. 10/19/98 20,21

Morrow v. Dyches,
328 S.C. 522, 492 S.E.2d 420
(Ct.App. 1997). 20

Revis v. Barrett,
321 S.C. 206, 467 S.E.2d 460
(Ct.App. 1996). 20

Sanitary & Aseptic Package Co. v. Shealy,
205 S.C. 198, 31 S.E.2d 253 (1953) 9

State v. Beach Co.
271 S.C. 425, 248 S.E.2d 115 (1978), 7

Townes Assoc., Ltd. v. City of Greenville,
266 S.C. 81, 221 S.E.2d 773 (1976). 7,17

Tyler v. Guerry,
251 S.C. 120, 160 S.E.2d 889 (1968).

Other Authorities

23 Am. Jur. 2d *Dedication* § 19 12

Black's Law Dictionary 6th ed. 16 (1991). 12

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE FULMORE ROAD HAD BEEN DEDICATED TO PUBLIC USE.

II. WHETHER THERE IS ANY EVIDENCE IN THE RECORD SUPPORTING THE TRIAL COURT'S FINDING THAT THE PUBLIC HAD ACQUIRED A PRESCRIPTIVE EASEMENT IN THE FULMORE ROAD.

STATEMENT OF THE CASE

Williamsburg County and other Plaintiffs filed a Rule to Show Cause on August 12, 1996, after the Appellant Roland V. Askins, Jr., individually and as Trustee of RVA Trust, and Buddy Platt barricaded a road known as the Fulmore Road on July 4, 1996. The Appellant filed an Answer and Counterclaim and Return to Rule to Show Cause with an Affidavit of Roland V. Askins, Jr., on August 16, 1996. A Hearing on the Rule to Show Cause was held on August 16, 1996, and an Order was issued on August 21, 1996, by the Honorable M. D. Shuler, granting relief of leaving the road open *pendente lite.*

Defendants filed a Motion for Summary Judgment and supporting memoranda on February 13, 1997, and a Hearing was held on November 20, 1997, before the Honorable Howard P. King. At such time, he denied the Defendants Motion for Summary Judgment by Order dated November 25, 1997.

A merits hearing was held before the Honorable M. D. Shuler, and an Order was issued by Judge Shuler on April 30, 1999, ordering that the Fulmore Road was a public road maintained by Williamsburg County and permanently enjoined and restrained the Appellant from blocking and impeding the right of the public to use the Fulmore Road. This appeal followed. The Appellants timely filed a Notice of Appeal on May 7, 1999.

FACTS

The Fulmore Road is a dirt road of approximately 1.6 miles in length which intersects with S.C. Highway S-45-553 (Beulah Road) on its western end, and Jones Road on its eastern end. Both Beulah Road and Jones Road are public roads. R.15. The Fulmore Road traverses through two separate tracts of private property: the RVA Trust tract on the eastern end, and the McAlister Estate tract on the western end. R.15.

Fulmore Road is designated as CR 24-301 on the state highway map system and has since at least 1968 been designated as a "county road" on the general highway map of Williamsburg County, South Carolina, prepared by the South Carolina Department of Transportation in cooperation with the United States Department of Transportation, Federal Highway Administration. R.16,17; R.App. 2, line 23 – R.App.3, line 21. Williamsburg County has maintained Fulmore road at least monthly or as often as weather would permit for more than twenty (20) years, has installed concrete pipe under the road to direct water on at least two occasions prior to or in 1978, and has hauled numerous loads of dirt to repair this road. R.16; R.81, line 11 – R.82, line 23; R.87, line 4 – R.88, line 20; R.53, line 10 – R.54, line 3, R.55, lines 1-4; R.27-28.

A number of citizens including Richard F. Burch, Willie "Buck" Fulmore, James William Hanna, C. B. Askins, Sr., John Benson Rodgers, Zell Gaskin and Margaret C. McAlister Lynch all live on or near the road in question and have submitted Affidavits in this case. R. 21, R.19, R. 24, R.23, R.25, R.App. 1, R. 20. Fulmore Road is necessary to allow Mr. Burch to reach his other farming operation which would otherwise require him to travel more than four (4) miles one way if Fulmore Road was closed. R.21. Mr. Burch has always used Fulmore road and he has been familiar with it for over 40 years and knows that it has been maintained by Williamsburg County. R.21.

Willie Buck Fulmore currently lives on Fulmore Road. His Affidavit states that Fulmore road has always been used and traveled by the public and plowed by Williamsburg County. Mr. Fulmore went further to state that all kinds of traffic have used the road, including school buses since the late 1920s of his own personal knowledge. R.19.

James William Hanna has lived in the area all of his life and travels the road regularly to get access to his property in the vicinity of Fulmore Road. Hanna's Affidavit states that the road has been maintained by Williamsburg County for at least 40 years. R.24.

C. B. Askins, Sr.'s Affidavit states that Fulmore Road has been plowed or used by the public for at least 20 or more years. R.23.

John Benson Rodgers is 65 years of age and was born and raised on Fulmore Road, and as long as he has been alive, Fulmore Road has been used and traveled by the public as well as maintained by Williamsburg County. He has personally witnessed the public use of the road and County maintenance for over 60 years. Additionally, he is responsible for Rodgers Cemetery on Fulmore road which has been operated for longer than he has lived, and people have always traveled the Fulmore Road to get to the Cemetery. R.25.

Zell Gaskin was born and raised on Fulmore Road. She confirms that the road has always been open to and used by the public. Gaskins' father lived on the road and used it since at least 1899. R.App.1.

Finally, Margaret C. McAlister Lynch is a lifelong resident of the area and owns 515 acres on both sides of Fulmore road adjacent to the Askins tract. She has owned the property since 1961 and states that the road has been used by the public all of the years she has owned the property. Since 1961, Lynch has utilized the road on a regular, almost daily basis, and it has been plowed and maintained by Williamsburg County since she has owned the property in 1961. R.20.

R. V. Askins, Sr., a predecessor in title and creator of the R. V. Askins Trust has observed on numerous occasions county work being performed on the Fulmore Road as it passes through his property and has accepted the improvements performed by Williamsburg County for more than forty (40) years. R.62, line 25 – R.63, line 8, lines 22-23, R.58, line 19--R.59, line 10.

ARGUMENTS

I. Standard of Review.

In its review of this action, the Court must utilize varying standards of review depending on the issues presented. An action to determine whether a roadway has been dedicated to the public is an action in equity. Tyler v. Guerry, 251 S.C. 120, 160 S.E.2d 889 (1968). Additionally, the scope or extent of an easement is a question in equity; however, the existence of an easement is a question of fact in a law action. Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct.App.1998). As to the equitable matters, this court can find facts in accordance with its own view of the preponderance of the evidence. Townes Assoc. Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). However, as to the question of fact in the action at law on the determination of whether or not a prescriptive easement exists, this Court reviews factual findings only for evidence which reasonably supports the trial judge's findings. Eldridge at 398.

In the present situation, the County can meet its burden by a preponderance of evidence that the Fulmore Road was dedicated to the public and accepted by Williamsburg County. Furthermore, evidence is present in the record to support the trial judge's finding of a prescriptive easement.

II. The Fulmore Road was Dedicated to Public Use.

The necessary elements the County must prove to show dedication to public use are 1) the owner must express in a positive and unmistakable manner his intention to dedicate his property to public use; and 2) there must be an acceptance of such property by the public. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993).

A. The Owner expressed in a positive and unmistakable manner his intention to dedicate the property to public use.

In the present case, evidence of an express dedication of the Fulmore Road to public use exists in the form of public maps and plats. One 1966 plat on lands of Carol R. McAllister (now owned by the Lynch family) reveals unlabeled dashed lines across the RVA Trust property where the Fulmore road is situate. R.104. An unnamed road, depicted as an unpaved county road, is depicted traversing the RVA Trust property in State Highway maps published on and after January 1, 1966. R.17. Fulmore Road was first formally named and identified as such on maps by J. D. Brockington in or about 1984. R.16. Finally, Fulmore Road was given a county road number CR-24-301 by William Wheeler under a contract with Williamsburg County in 1992. R.16.

However, an intention to dedicate property to public use "need not be made by deed or other writing, but may be effectually and validly made by acts or verbal declarations." Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct.App. 1988). Intent to dedicate can be implied from circumstances or the acts and conduct of the owner which give rise to such an inference. County of Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977). When proving an implied public dedication, the proof must be strict, cogent and convincing, and the acts proved must be inconsistent with any

construction other than dedication. Cleland v. Westvaco Corporation, 314 S.C. 508, 431 S.E.2d 264 (Ct.App. 1993).

Although dedication may not be implied from permissive, sporadic and recreational use of the property, Id citing State v. Beach Co. 271 S.C. 425, 248 S.E.2d 115 (1978), an owner's intent to dedicate may be implied from the long public use of the land to which the public claims dedication. Id. citing Hoogenboom v. City of Beaufort, 315 S.C. 306, 433 S.E.2d 875 (1992) reh'g denied 317 S.C. 12,451 S.E.2d 393 (1994).

1. Extensive long term public usage implies an unequivocal intent to dedicate.

Because an intention to dedicate may be implied from the circumstances, County of Darlington, at 575, a review of the particular circumstances of the extensive long term public usage is mandated.

In the present case, this road connects two public roads. R.15. Richard Burch, a local farmer, submitted an Affidavit stating that he has traversed the Fulmore Road for over 40 years, knew it to be a public road maintained by the county, and is necessary to allow him and his employees to reach his farming operation which would otherwise require him to travel more than four miles one way if the Fulmore Road was closed. He goes further to state "the road has always been used commonly and regularly by the public. It has always been a public road." R.21.

Willie "Buck" Fulmore, a sixty-nine-year-old gentleman was born and raised on Fulmore Road and has lived there all of his life. He states, "I can report that Fulmore Road has always been used and traveled by the public. I can also state that the road has always been plowed by Williamsburg County. All kinds of traffic used the road on a regular basis, including school buses. I personally know this has been true since the late 1920's and I am told

the road was there for much longer than I have been alive." R.19.

James William Hanna has lived in the area his entire life and travels the road regularly to get access to his property in the vicinity of the Fulmore Road. He stated that barriers on the section of Fulmore Road across the RVA Tract have severely limited access to his family's property. Also, the barriers interrupted the normal flow of traffic in the area. He states as follows "Having lived in this area all of my life, I can state unequivocally that Fulmore Road has always been used and traveled commonly and regularly by the public. I can also report that the road has been maintained by Williamsburg County for at least forty years." R.24.

C. B. Askins, Sr., a neighboring land owner, stated that he has been familiar with the Fulmore Road for twenty years. He states that "the road has always been used by the public," and "it has always been maintained by Williamsburg County." He states that the Fulmore Road . . . had been unilaterally closed by a landowner. That has created a problem for all of the residents of that area by interrupting the normal flow of travel. For example, I used Fulmore Road to go to Kingstree from my farm. That is no longer possible. There are no other alternatives as short or convenient." R.23.

John Benson Rodgers, a sixty-five-year old man born and raised on the Fulmore Road, stated that as long as he has been alive, the Fulmore Road has been used and traveled by the public and maintained by the County. He personally witnessed the public use of the road and county maintenance for over 60 years. Additionally, he is responsible for Rodgers Cemetery on Fulmore Road which has been operated for longer than he has lived, and people have always traveled the Fulmore Road to obtain access to the cemetery. R.25.

Zell Gaskin was born and raised on Fulmore Road, and she confirmed that the road has always been open to and

used by the public. Her father also used the road and lived on the road, and he used it from approximately 1899 until he passed away. R.App. 1.

An additional witness, Margaret C. McAlister Lynch is a lifelong resident of the area and owns the 515 acre farm on both sides of the Fulmore Road adjacent to the RVA Trust Tract. She has owned the property since 1961 and states that the road has been used by the public for all of the years that she has owned it. She uses the road on a regular, almost daily basis, and she has personally witnessed the plowing and maintenance of the road by Williamsburg County since she has owned the property in 1961. R.20.

The County of Darlington experienced a similar situation to the one at hand in County of Darlington, at 572. In the Darlington case, the county brought an action against owners of a tract of land to determine the right of the public to use a recreational area known as Whipples Landing located on Louther's Lake and a dirt road which connected the public road with the landing area. The Darlington Court found evidence to support a finding that the public had acquired an easement in the road by implied dedication. Citing 23 Am. Jur. 2d *Dedication* § 19, the Court quoted "where acts of the owner justify the public authorities in believing the intention exists and they act on such belief, a dedication may be found to have occurred. . . . Such intention may be manifested by the owner's acquiescence in continuous use of the land by the public under the claim of the general public right. " Darlington at 576.

In the Darlington case, the parties stipulated that there were many members of the public who could testify that the road and "landing" in question had been used as a public road for approximately 75 to 80 years. The Darlington Court stated, "We are of the view, however, that the continuous and widespread public usage of the road for at least 50 years, without charge or interference from previous owners and these Landowners, clearly establishes the public character of the road." Darlington at 575.

The Appellant argues his failure to interfere with the public's usage of the road amounts to permissive use. Distinguishing an owner's acquiescence in long public use of his land rising to the level of an intent to dedicate from an owner's permissive allowance of the public using his private land requires an in depth factual examination. Acquiescence is defined as " . . . Passive compliance or satisfaction; distinguished from avowed consent on the one hand, and, on the other, from opposition or open discontent. Conduct from which assent may be reasonably inferred." Black's Law Dictionary 6th ed. 16 (1991). Black's Dictionary goes further to distinguish acquiescence from laches by making the following distinction: "'Acquiescence' relates to inaction during performance of an act while 'laches' relates to delay after act is done." Id. (emphasis added).

In the present circumstance, no question exists that prior to the Appellant's instigating the present action, no charge or interference from any use of the public of the Fulmore Road traversing the RVA Tract has ever been performed. Based upon the sworn testimony of the various concerned landowners and members of the public outlined above, the denotation as a public county road on county maps, state highway maps, on an old plat, and extensive long term public usage of this property shows clear and convincing evidence of dedication to the public by implied unequivocal consent.

2. The Owner acquiesced to extensive long term public maintenance from which intent to dedicate is implied.

In the present case, the Appellant makes much of Williamsburg County's notoriety of improperly maintaining private roads. The premise for all litigation concerning Williamsburg County's improper maintenance of private roads is based upon private landowner's requests that the County use its equipment or manpower to service private

roads. In the situation at hand, the Appellant does not argue that he requested any public service for a private purpose. The flaw in his argument is that he seeks to privately benefit and penalize the public from the allegedly illegal maintenance that the County has been performing on his land with his full knowledge. R.62, line 25 –R.63, line 8, lines 22-23. The case at hand is remarkably on point with the County of Darlington case, and the Appellant seeks to distinguish the present case by the proposition that "any public maintenance by Williamsburg County was illegal and does not reflect an implied intent to dedicate or any acceptance of such an implied dedication." Appellant's Initial Brief p. 10. The Appellant cites the County's Memorandum of Law submitted in the case of King v. Poston which stated that "the prior conduct of the county in plowing the road in question has no precedential or persuasive value in determining whether the road is public or private." However, this statement goes to the question of public acceptance of the dedication of the road, not to the intent to dedicate.

A careful examination of the County's litigious past with regard to road maintenance reveals that the County had in the past accepted roads intended to be dedicated for public maintenance for public maintenance that should not have been accepted. King v. Poston, 98-UP-435 S.C. Ct.App. 10/19/98, propounded by Appellant as controlling, involved a private landowner who was upset because he wanted the County to continue maintaining a road the landowner claimed had been dedicated to public use; however, the County would no longer accept it due to the failure of a public purpose in maintaining what to the County was an obviously private road. The Court's finding that Williamsburg "County's maintenance of Stewart Road over the years before the Circuit Court orders were issued is not sufficient to establish the public character of the vicinity such that the area could be considered 'improved.' [because] The testimony of the witnesses and the orders themselves

indicate Williamsburg County routinely maintained private roadways for the accommodation of landowners." King v. Poston, 98-UP-435.

The County's position is that it acted in good faith in full accordance with the Order of the Honorable Johnathan Z. McCowan issued on October 22, 1984, Case No.: 84-CP-45-321. Section 2(c) of this Order allows the County to maintain roads which have been in continuous use for more than twenty years without any written documentation as long as there was no question or controversy surrounding the road in question. R.111-R.118.

The facts indicate that the Appellant did not request public maintenance of his allegedly private road. There is no evidence in the record that Williamsburg County maintained this allegedly private road on the request of any private landowners situate along the road. The evidence is also clear that not only did the Appellant have knowledge that someone was maintaining his allegedly private road; but also, that he personally witnessed Williamsburg County maintaining his road. R.62, line 25 – R. 63, line 8. This conduct rises to the level of acquiescence in the dedication of this road to the public. At the very least, this conduct rises to the level of unclean hands in sitting back, watching and allowing the public to use and the County to maintain a private road every four to six weeks for well in excess of twenty (20) years, and then to claim that the maintenance was illegal.

The Fulmore Road received public maintenance from the County because it was widely used by the public. R.19, R.20, R. 21, R.23, R.24, R.25, R.App. 1, R. 97, lines 9-15 (the County employee who actually performed the work on a monthly basis). The County did not obtain any further written documentation regarding a perpetual easement of the Fulmore Road because prior to this litigation, there was never any questions raised by anyone as to the public nature of this road. Evidence in the record exists showing that for the past sixty years, the County has plowed and scraped the Fulmore Road. R.25. In the past twenty years, the County

installed drainage pipes under Fulmore Road in at least two locations, has cut bushes on the road, has repaired the road and has maintained the road almost monthly by scraping it and hauling dirt to repair the road. R. 27, R. 81, line 11 – R.82, line 23, R. 87, line 4 – R. 88, line 20; R. 53, line 10 – R. 54, line 3, R. 55, lines 1-4.

B. The County accepted Fulmore Road as a public road.

In order to perfect dedication, there must be an express or implied acceptance of a dedication before it is complete. "No formal acceptance is necessary to constitute a valid dedication." Boyd v. Hyatt, 294 S.C. 360, 366, 364 S.E.2d 478, 481 (Ct.App. 1988). The acceptance must also be made within a reasonable time. Helsel v. City of North Myrtle Beach, 307 S.C. 24, 413 S.E.2d 821 (1992). Acceptance by the public of the property dedicated may be implied by the public's continuous usage of the property, Id., and "the sufficiency of the use depends on the circumstances of each case." Boyd at 366, 481. In the Helsel case, they found acceptance of the offer of dedication through a public authority's using, repairing or working the streets. Helsel at 27.

In the present case, the public and the County accepted the offer of dedication by travelling the Fulmore Road extensively for sixty years or more. R. 25. Other sworn Affidavits show public use in travelling the Fulmore Road for twenty or thirty years. This traffic includes school buses, members of the public, and visitors to the Rodgers Cemetery located on the Fulmore Road. R.19, R.25, R. 20. At no time over the past sixty or more years prior to this litigation did the Appellant assert to the public the private nature of the road by warning or challenging the public use of the road.

The Fulmore Road was accepted for dedication by the County's performing maintenance on the road through installing drainage pipes in the late 1970s, R. 87, lines 4-12, and scraping and hauling dirt to repair the road for in excess of sixty (60) years. R. 25, R. 19. Evidence in the record shows monthly maintenance of the road for in excess of 30 years. R. 53, lines 1-24, R.55, lines 1-4, R.56, line 22 – R.57, line 6; R. 25, R. 19.

Appellants make much of Williamsburg County's litigious past regarding illegal public maintenance. The County's history with regard to public maintenance of private roads is one factor to be considered in whether or not it accepted this road as a public or private road. See Tyler v. Guerry, 251 S.C. 120, 160 S.E.2d 889 (1968) (stating that "[t]he fact that the county road building authority assisted the landowners by supplying labor and equipment is not conclusive nor is the fact that the road may have been worked on occasionally controlling."). In Tyler v. Guerry, the public sought public dedication of a road and a recreational area known as Brown's Landing. The landowners in Tyler had worked with the County in obtaining labor and equipment and that the road had been worked occasionally. The Tyler Court stated "Certainly the action of the county has not been of such character that this section of road has become a part of the county system." Tyler at 127, 892. In the present case, the action of the county had risen to the level of the road being a part of the county and state highway system since 1966. R.17.

In an unpublished opinion issued by this Court in October, Plaintiffs sought desperately to have a road declared public so that they could obtain public maintenance of it by the Defendant Williamsburg County. King v. Poston, 98-UP-435 (Ct.App. Oct. 19, 1998). In that case, the County did not participate in the appeal and would not agree to publicly maintain the road due to its private nature. R.69, line 16 – R.70, line 16. In that opinion, the Court held that county maintenance of the road in question was not

sufficient to establish the public character of the vicinity. King at 8. "The testimony of witnesses and the orders themselves indicate Williamsburg County routinely maintained private roadways for the accommodation of landowners." Id. The King case involved a single lane unpaved road which served no public purpose. It had been used by the lessees of the hunting and farming rights to the private tract of land, however, an important distinction is that the original maintenance was at the request of the private landowner and the road had since been abandoned by the county. In the case at hand, no evidence exists that any such maintenance on the Fulmore Road was at the request of the Appellant herein – more importantly, it was maintained with his acquiescence and knowledge that members of the general public traversed the Fulmore Road on a daily basis. The Fulmore Road is distinguishable from the Stewart Road for a primary reason that the Stewart Road served no valid public purpose – the primary reason why Williamsburg County did not maintain the Stewart Road.

C. Assessment of taxes on the Fulmore Road does not preclude dedication and acceptance.

The Appellant further argues that because he has paid taxes on this land, it tends to prove no dedication. No question exists that evidence of assessment and payment of taxes on property claimed to have been dedicated to public use is admissible on the issue of whether there has been dedication and acceptance. Anderson v. Town of Hemingway, 269 S.C. 351, 237 S.E.2d 489 (1977). However, nonassessment or assessment of taxes on land is not conclusive on the issue of dedication and acceptance. Helsel v. City of North Myrtle Beach, 307 S.C. 24, 413 S.E.2d 821 (1992). The nonassessment or assessment of taxes on land may be considered in conjunction with other facts to show there has been a dedication and acceptance." Helsel at 28.

The County stipulated that as of 1967, 1.2 acres were removed from the tax assessment of the McAlister Estate tract, the other private tract on which the Fulmore Road traverses, representing a right-of-way for a public road across the McAlister Estate tract. R. 15. No taxes have been levied or paid upon the McAlister 1.2 acre portion by any owner of said tract since that time. Id. Furthermore, the County concedes that it has levied taxes on the entire 191.5 acre RVA Trust property. R.16.

The County Tax Assessor Lois Martin testified that where there is a public road going through a piece of private property, it is normally taken out of the property for tax purposes because the property owner will come and tell them. R.76, lines 5-13. She goes further to testify that "there are certain things in [her] office . . . that [she is] only allowed to do by the property owner requesting it." R.76, lines 19-21. The Appellant argues that this constitutes evidence disproving his intent to dedicate; however, Ms. Martin goes further to state that "Let me give you a for instance, and this falls in the same line. If you have given an easement to a power company . . . for a power line easement over your property, you are paid for that easement. You have a length and a width of that easement, and I don't pull that property out and put it at a lower rate without a written request from the property owner." R.76, line 23-R.77 line 5.

Due to the rural nature of this land, the de minimis amount of taxes involved, and the failure of the landowner to take any action for itself to request that it pay no taxes, the county argues that the remaining facts proving intention to dedicate outweigh the Appellant's argument based upon payment of taxes.

III. The County Obtained a Prescriptive Easement for Fulmore Road.

To establish a prescriptive easement, the County bears the burden of proving the following elements: 1) the public's continuous and uninterrupted use or enjoyment of the right to use and traverse the Fulmore Road for a period of twenty years; 2) the identity of the things enjoyed – the Fulmore Road; and 3) the use of the road must have been adverse or under a claim of right. Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 547 (1951). As stated above, determining whether or not an easement exists is a question of fact in an action at law requiring this court review the record for any evidence supporting the trial judge's finding. Eldridge at 398.

A. The County's use was adverse and under claim of right.

Prescriptive easements can be established through use which is either adverse or under a claim of right. Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct.App. 1996). Use under claim of right is non-permissive use. King v. Poston, 98-UP-435; Sanitary & Aseptic Package Co. v. Shealy, 205 S.C. 198, 31 S.E.2d 253 (1953) (finding a private prescriptive easement upon an individual mistakenly believing an alleyway was a public driveway).

The Appellants claim that issues as to whether "permissive" use can be "adverse" was resolved in this Court's decision in Morrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (Ct.App. 1997). The Morrow case involved parties who were asserting a private prescriptive easement over an area adjacent to the Plaintiff's grocery store for parking. In this case, this Court's scope of review on the determination of whether an easement existed or not was whether there was any evidence supporting the trial judge's finding of no easement. Morrow at 526, 423. The Morrow Court stated that

> It could possibly be contended that Morrow's belief that he had a right-of-way was sufficient for a prescriptive easement pursuant to a "claim of right." However, the only evidence regarding Morrow's predecessor-in-interest was that Morrow "thought" Raymond Still had a right-of-way across the property. This evidence is insufficient to establish that Still had a belief amounting to a claim of right, and again tacking requires proof of sufficient use for predecessors in interest as well. . . . the [Morrows] have only owned the property since October 1992 . . . .

Morrow at 529, 424.

The present case is distinguishable from Morrow. The claim of right the Morrows claimed was based upon their predecessor in interest Mr. Still, as the Morrows had only owned the property since October of 1992, and tacking a claim of right requires proof of sufficient use for predecessors in interest as well. Id. Another important distinction is that the claim of right and adverse use being asserted here is by the public – not a private landowner. Although the Morrow case involved a parking lot for the Morrow's store, and the general public had parked there during town festivities, it was not asserted that there had been long term public usage and/or long term public maintenance – a public easement was not being asserted. Furthermore, there was no evidence that the Morrows had maintained or improved the parking lot themselves.

Just as in King v. Poston, 98-UP-435, a finding of hostility is inherent in the trial court's finding that the Plaintiff's use of the Fulmore Road was under claim of right. King at 4. The public and the County certainly believed that the Fulmore Road was a public road, and "use under a mistaken claim of right does not establish permissive use as a matter of law." King at 5 citing Delk v. Hill, 365 S.E.2d 218 (N.C.Ct.App. 1988).

The evidence of use that is adverse or hostile and under claim of right in the matter at hand upon which the trial judge relied is clear. The Fulmore Road has been listed on the state highway maps since 1966 and has continuously been used by the public for more than sixty (60) years. R. 17, R. 25. Evidence in the record reflects the public opinion that there was never a question as to the public nature of the Fulmore Road. The County has maintained this road by putting in drainage pipes, repairing the road, cutting ditches, some of which has been in the physical presence with the actual knowledge and acquiescence of the predecessors in title. R. 62, l. 25 – R.63, l. 8. Additionally, the road connects two undisputed public roads and has been used by the citizens of the county on a continuous daily basis for many years. R. 25, R.20, R. 23, R. 19, R.App.1.

The County employee who actually plowed and graded the Fulmore Road testified in his deposition that he had plowed the Fulmore Road approximately one per month since 1984. R. 84, lines 7-10. He further testified that about 17 or 18 years ago, in approximately 1978 or 1979, that he worked with the bridge crew who actually laid concrete pipe in two places on this road for a ditch and laid four joints of five foot pipe which was paid for by the county. R.87, lines 4-12. Over the 130 to 140 times Mr. Mosely testified that he had been plowing the road, he testified that no one ever interrupted him to stop plowing the road nor did they interrupt him or tell him to stop laying the pipe on the Fulmore Road, nor did they interrupt him or question him on the private nature of this road. R.96, line 9- R. 97 line 5.

Mr. Thomas Gause, a retired Williamsburg County employee worked as a bush cutter, then motorgrader, and then as Superintendent of Public Works from approximately 1965 to mid 1980s. R.51, line 17 – R.52, line 22. During that period he graded Fulmore road on an average of once a month. R.53, line 22 – R.54 line 10. Mr. Gause goes further to state that "That road was traveled when I was a boy [in the 1940's and 1950's] and it was maintained by the county.

From 1965 right on I know the road has been maintained and it has never has stopped being maintained." R.62, lines 3-6. When questioned about Mr. Askins' actions causing him to believe that Fulmore Road was a public road, he answered, "[W]hen we were maintaining the road or doing work on the road, Mr. Askins saw us working on the road. He saw what we were doing, and he never complained. If I didn't want the road worked on, I would have complained. " R.62, line 25 – R.63, line 8. He was questioned as to how often that [Mr. Askins' observation of county maintenance] would occur, and he stated "I have seen him several times. . . . they never had no complaints." R.63, lines 22-25.

B. The County's use had been continuous and uninterrupted for over twenty years and the identity of things enjoyed was proved.

The parties stipulated below that James Moseley, a County motorgrader operator, has scraped the Fulmore Road since approximately 1977, and installed a drainage pipe under Fulmore Road in 1978. R. 16. The Appellant conceded below that there was continued and uninterrupted use or enjoyment by the public of the Fulmore Road for more than twenty (20) years and that the identity of the thing enjoyed is proved.

IV. The Injunction prohibiting the Appellant from closing his road does not amount to a deprivation of private property without just compensation.

The County has disputed the closing of the Fulmore Road because the Fulmore Road is a public road by either the theory of public dedication or by the County's obtaining it through a public prescriptive easement. For these reasons, the injunction prohibiting the Appellant from closing his road does not amount to a deprivation of private property without just compensation.

CONCLUSION

The evidence in the record establishes that the Appellant through his acquiescence in the extensive long term public usage and extensive long term public maintenance dedicated the .7 mile portion of the RVA Tract known as a section of the Fulmore Road to the public. Evidence also exists in the record from which a finding could be made that in the alternative, Williamsburg County acquired a prescriptive easement in the .7 mile portion of the RVA Tract known as a portion of the Fulmore Road by adverse use under a claim of right for a continuous period in excess of twenty years. For these reasons, Williamsburg County prays that the decision of the lower court be affirmed.

Respectfully submitted,

W.E. Jenkinson, III
Jennifer R. Kellahan
Post Office Drawer 669
Kingstree, South Carolina 29556
(843) 354-7417
Attorneys for Respondent
Williamsburg County

September 1, 1999
Kingstree, South Carolina